

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ELOISE ANDERSON, et al.,
Petitioners,
v.

DESHAWN GREEN, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE
THE AMERICAN BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
STATEMENT	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THIS COURT'S DECISIONS REQUIRE IN- VALIDATION OF THE CALIFORNIA STATUTE	6
A. The <i>Shapiro</i> Doctrine	6
B. The California Statute's Effect on Access to "Basic Necessities"	9
C. The Absence of a Compelling Justification...	14
II. <i>SHAPIRO</i> REMAINS GOOD LAW AND SHOULD NOT BE OVERRULED OR UN- DULY RESTRICTED	15
A. The Court Should Not Read Into the <i>Shapiro</i> Doctrine a New Principle Allowing States to Disfavor New Residents As Long As They Match the Benefits Paid in Each New Resi- dent's Prior State	15
B. Principles of <i>Stare Decisis</i> Argue in Favor of Continuing to Apply <i>Shapiro</i> with Full Force in This Context	18
III. EVEN UNDER A MORE RELAXED LEVEL OF SCRUTINY, THE CALIFORNIA LAW WOULD STILL BE UNCONSTITUTIONAL...	24
A. The Statute Does Not Leave Recipients as Well Off as They Would Have Been in Their Former States	24
B. The Statute Lacks a Rational and Legitimate Basis	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES	Page
<i>Arizona v. Rumsey</i> , 467 U.S. 203 (1984)	19
<i>Attorney General of New York v. Soto-Lopez</i> , 476 U.S. 898 (1986)	<i>passim</i>
<i>Bacchus Imports v. Dias</i> , 468 U.S. 263 (1984)	23
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	<i>passim</i>
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956)	21
<i>Harper v. Virginia State Board of Elections</i> , 383 U.S. 663 (1966)	21
<i>Hilton v. South Carolina Pub. Ry. Comm'n</i> , 112 S. Ct. 560 (1991)	18
<i>Hooper v. Bernalillo County Assessor</i> , 472 U.S. 612 (1985)	<i>passim</i>
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	23
<i>Memorial Hosp. v. Maricopa County</i> , 415 U.S. 250 (1974)	<i>passim</i>
<i>Moragne v. State Marine Lines</i> , 398 U.S. 375 (1970)	18, 19
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 161 (1989)	18
<i>Planned Parenthood v. Casey</i> , 112 S. Ct. 2791 (1992)	19
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	<i>passim</i>
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942)	21
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975)	20
<i>United States v. Carolene Products</i> , 304 U.S. 144 (1938)	22
<i>Vasquez v. Hillery</i> , 474 U.S. 254 (1986)	19
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982)	<i>passim</i>
MISCELLANEOUS	
<i>ABA, ABA Constitution and Bylaws: Rules of Procedure</i> , House of Delegates, Art. 1, § 1.2, 1994-95	2
<i>ABA Commission on Homelessness and Poverty, Report to the ABA House of Delegates</i> (1992)	2
<i>ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families, America's Children at Risk</i> (July, 1993)	2, 3, 9

TABLE OF AUTHORITIES—Continued

	Page
<i>ABA Steering Committee on the Unmet Legal Needs of Children, The Impact of Domestic Violence on Children</i> (1994)	2
<i>"Building Together—Housing, AFDC and Child Welfare," Family Matters</i> (Spring 1994)	13
<i>Center on Hunger, Poverty and Nutrition Policy, Two Americas: Comparisons of U.S. Child Poverty in Rural, Inner City and Suburban Areas</i> (1994)	10
<i>"Child Welfare—A System in Crisis," Family Matters</i> (Winter 1994)	13
<i>Children's Defense Fund, America's Children Falling Behind: The United States and the Convention on the Rights of the Child</i> (1992)	10
<i>Children's Defense Fund, Leave No Child Behind: The State of America's Children</i> (1992)	12, 13, 14
<i>"Foster Care Beats AFDC—Financially," Family Matters</i> (Winter 1994)	13, 14
<i>House Committee on Ways and Means, 103d Cong., 2d Sess., 1994 Green Book</i> (July 15, 1994)	4, 9, 11
<i>"Kinship Care and AFDC," Family Matters</i> (Spring 1994)	14
<i>Stephen Loffredo, "If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare</i> , 11 Yale Law and Policy Review 147 (1993)	22, 23
<i>Thomas R. McCoy, Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?</i> , 28 Vanderbilt L. Rev. 987 (1975)	7, 22
<i>National Law Center on Homelessness and Poverty, No Way Out: A Report Analyzing the Options Available to Homeless and Poor Families in 19 American Cities</i> (August, 1993)	13, 14
<i>The Stanford Center for the Study of Families, Children, and Youth, Welfare Reform and Children's Well-Being: An Analysis of Proposition 165</i> (Sept. 1, 1992)	<i>passim</i>
<i>Jennifer Wolch and Michael Dear, Malign Neglect: Homelessness in an American City</i> (1993)	11, 12
	24, 25

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INTEREST OF AMICUS

The American Bar Association (ABA) is the leading national membership organization for the legal profession with more than 350,000 members across the United States.¹ "The purposes of the Association are to uphold and defend the Constitution of the United States, . . . [and] to apply the knowledge and experience of the pro-

¹ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

fession to the promotion of the public good." ABA, *ABA Constitution and Bylaws: Rules of Procedure*, House of Delegates, Art. 1, § 1.2, 1994-95.

This case implicates the ABA's long held concern for the well-being of children and families living in poverty. The ABA has expressed this concern by creating the Center on Children and the Law, the Steering Committee on the Unmet Legal Needs of Children, and the Commission on Homelessness and Poverty. In the past two years alone, the ABA has produced two reports on the difficulties facing children, including *America's Children at Risk* (American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and their Families, *America's Children at Risk* (July, 1993) [hereinafter "*Children at Risk*"]), its "landmark" report on the unmet legal needs of children. *See also* ABA Steering Committee on the Unmet Legal Needs of Children, *The Impact of Domestic Violence on Children* (1994). Among other recommendations, that report called for "[t]he organized bar [to] seek improvements in the AFDC program . . . and [to] work to defeat any proposed changes that penalize recipients." *Children at Risk*, *supra*, at 12. Similarly, the ABA's House of Delegates adopted a resolution urging "that welfare programs be funded at a level required to meet the need for the basic essentials of life," a level that will not be obtained by new California residents if the California statute at issue in this case goes into effect. *See* ABA Commission on Homelessness and Poverty, *Report to the ABA House of Delegates* (August 1992), Recommendation No. 122.

The ABA also has expressed specific concern about durational residency requirements. In part as a result of its view that "[t]he express purpose of discriminating against newcomers is constitutionally impermissible," *id.* at 5, and its understanding that "benefit levels are tailored to the cost of living in [each] jurisdiction, and . . . no benefits in any state in the nation are sufficiently generous to lift a family above the poverty line," *id.* at 4, the

House of Delegates resolved "[t]hat the American Bar Association opposes linking public assistance for needy persons to requirements which infringe on the right of privacy and on other individual freedoms, such as the right to travel." *Children at Risk*, *supra*, at 87. The Association believes that its experience with these issues will allow it to make a substantial contribution to the Court's consideration of this case.

STATEMENT

This case involves a constitutional challenge to California Welfare and Institutions Code section 11450.03, which limits the level of Aid for Families with Dependent Children (AFDC) benefits available to new California residents during their first year in the State. During that first year, the statute limits benefits to the level provided by the state from which an individual has moved. As a result, many new residents would receive benefits that are only a fraction of those paid to other Californians in comparable financial circumstances. This is true despite the fact that the cost of living in California is among the highest of any state.

AFDC is a federal program, administered by the states, which is designed to provide money to families who lack sufficient income to meet their children's basic needs. *See* The Stanford Center for the Study of Families, Children, and Youth, *Welfare Reform and Children's Well-Being: An Analysis of Proposition 165*, at 2 (September 1, 1992) [hereinafter "*Welfare Reform*"]. Seventy percent of the recipients are children, almost half of whom are below the age of six; the other thirty percent are the children's parents or caretakers. *See id.* at 1, 14. Most of these families have just one or two children, *see id.* at 14, and approximately half receive benefits for less than a year. *See id.* at v, 18.

Seventy percent of the families who receive AFDC are headed by a single parent, nearly always the mother. *See id.* at iv. One large group of these single mothers

consists of women who have a high school or greater education, are older than 25, have children under five, and have been catapulted into poverty by divorce. The second large group consists of women who are 20 to 30 years old and who have little education. *See id.* at v.

AFDC benefits vary widely from state to state. At the time this case was filed, the maximum AFDC grant for a family of three in California was \$624 a month. *See House Committee on Ways and Means*, 103d Cong., 2d Sess., 1994 *Green Book* 375 (July 15, 1994) [hereinafter "1994 *Green Book*"]. This was significantly less than the federal poverty level for a family of three.² In Texas, by contrast, the maximum benefit for a family of three was \$184 per month. *See id.* at 376. Under section 11450.03, that ceiling would also apply to any Californians who had previously resided in Texas and who needed to apply for assistance during their first year of residence.

Respondents filed a class action challenging the constitutionality of California's limitation on benefits for new residents. The district court agreed that the law was unconstitutional, finding that it infringed respondents' right to travel under this Court's line of cases beginning with *Shapiro v. Thompson*, 394 U.S. 618 (1969). *See Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993). The United States Court of Appeals for the Ninth Circuit affirmed, adopting the reasoning of the district court. *See Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994).

SUMMARY OF ARGUMENT

1. This case fits squarely within the holdings of *Shapiro v. Thompson* and its progeny, which require a state to show a compelling interest to support any law that singles out new state residents and denies them the

² Using 1994 data, California's AFDC benefits only constituted 86% of the federal poverty level even when combined with food stamps. *See 1994 Green Book* at 366.

basic necessities of life or other fundamental interests. While California's rule is slightly less draconian than the complete bar to welfare benefits at issue in *Shapiro*, the benefits of new residents are reduced to a level far below what is required for a minimally acceptable quality of life. Moreover, the State has not come close to offering a compelling interest to support this discrimination against new residents.

2. Petitioners ask the Court to relax the standard of scrutiny that would apply to this case under *Shapiro*. They also ask this Court to establish a rule allowing them to disfavor new residents—to whatever extent and for whatever reason—as long as the benefits match those the new residents would have received in their prior states. These requests should be rejected. *Shapiro*'s principles remain worthy of support. They help to prevent the erosion of a unified Nation and the creation of second class citizenries. Moreover, petitioners have offered no argument sufficient to justify departing from principles of *stare decisis* in this case. Neither *Shapiro*'s compelling-interest standard nor its central principle of ensuring equality in fundamental benefits between new and long-term residents has been undercut by recent cases. Furthermore, this central principle is supported by similar principles animating other areas of constitutional law.

3. Even if the Court were to overturn *Shapiro* in favor of rules proposed by petitioners, California's law could not survive. First, it does not ensure that new residents continue to receive the same level of benefits as they received in their former states, and it thus must receive strict scrutiny even under petitioners' theory. Second, it cannot even survive rational-basis scrutiny, because the purposes proposed by the State either do not distinguish between new and long-term residents or are themselves illegitimate.

ARGUMENT

California's statutory restriction on welfare benefits for new residents is plainly unconstitutional. It denies the "basic necessities of life" to many thousands of Californians, solely because they are new to the State. Such a rule requires a compelling justification. Rather than offering such a justification, petitioners have sought to change the nature of the legal inquiry, arguing that it is constitutionally permissible to discriminate against new residents as long as their treatment is at least as favorable as they would have received in their prior home state. This approach fundamentally misconceives the concerns that have animated this Court's "right to travel" decisions. It should be rejected.

I. THIS COURT'S DECISIONS REQUIRE INVALIDATION OF THE CALIFORNIA STATUTE.

A. The *Shapiro* Doctrine.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), and its progeny—*Dunn v. Blumstein*, 405 U.S. 330 (1972), and *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974)—this Court applied strict scrutiny to laws that denied important benefits or fundamental rights to persons solely because they had recently exercised their right to move from one state to another. Under that standard, California's limitation on AFDC benefits for new residents cannot stand. Indeed, this case is indistinguishable from *Shapiro* itself.

The state law at issue in *Shapiro* barred all welfare payments to new residents for one year. Recognizing that such a restriction would severely penalize interstate migration by indigents, the Court required the state to show a compelling state interest. It rejected, as constitutionally illegitimate, the asserted goal of discouraging poor persons from moving to the state, reasoning that a state may not set out to discourage exercise of a constitutional right. *See Shapiro*, 394 U.S. at 631. It added that it is

no more legitimate to attempt to "fence out those indigents who seek higher welfare benefits," *Shapiro*, 394 U.S. at 631, or to attempt to categorize citizens, in the distribution of public benefits, on the basis of the "contributions" they have previously made to a given state, *see id.* at 632. Finally, the Court rejected a fiscal rationale, holding that "saving of welfare costs cannot justify an otherwise invidious classification." *Id.* at 633. *See also Maricopa County*, 415 U.S. at 263 ("appellees must do more than show that denying free medical care to new residents saves money").

The Court later applied *Shapiro* to strike down laws that barred new residents from voting (*Dunn v. Blumstein*) and from receiving free nonemergency medical care for indigents (*Maricopa County*). In each of these cases, as in *Shapiro* itself, the basis of the Court's decision was the inferior treatment of new residents when compared with long-term residents *in the same state*. For example, in *Maricopa County*, it was quite likely that surrounding states provided less medical care to their residents than the free emergency care to which new residents were entitled after settling in Maricopa County. *Cf. Maricopa County*, 412 U.S. at 271 (Douglas, J., concurring) (noting that eight nearby Arizona counties had no county hospitals at all and only provided indigent care on a contract basis). As a result, "any particular indigent moving to Maricopa County from outside the State of Arizona would probably experience a *net gain* rather than a net loss in the availability of free medical care." Thomas R. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vanderbilt L. Rev. 987, 1008 (1975). Thus, in concluding that new residents had been penalized for moving to Arizona, the Court relied on a comparison of their benefits with those of long-term residents rather than on a comparison with the benefits to which new residents had been entitled in their former states. As the Court concluded, "the right of interstate travel must be seen as insuring new residents the

same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Maricopa County*, 412 U.S. at 261.³

Since *Maricopa County* the Court has not considered a case involving discrimination against new residents with respect to basic necessities or fundamental rights. However, in cases involving discrimination with respect to less important benefits, the Court has continued to insist that there is no legitimate interest in favoring long-term residents *per se*, and has therefore invalidated the laws at issue in each of these cases as failing to survive even rational-basis scrutiny. *See Zobel*, 457 U.S. 55 (1982) (invalidating an Alaska statute which distributed surplus revenue based on length of residence); *Hooper*, 472 U.S. 612 (1985) (rejecting exemption from property tax that applied only to Vietnam veterans who were state residents before 1976); *Soto-Lopez*, 476 U.S. 898 (overturning civil service employment preference provided only to veterans who were New York residents when they entered the armed forces).

Thus, the Court has held, in essence, that a state may not, absent some very good justifications, differentiate among its own residents based on the fact that some of them have recently exercised their right to travel. And it has held that such discrimination requires a particularly compelling justification when it affects a person's basic needs or fundamental interests.

³ *See also Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (conceptualizing the distinction at issue as one between "two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction"); *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) ("[T]he right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents."); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985) (same); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986) (same) (plurality opinion).

B. The California Statute's Effect on Access to "Basic Necessities."

The law at issue here plainly falls into the category requiring the most compelling justification. The reductions in AFDC benefits it requires will, by their very nature, affect new residents' access to "basic necessities of life." *Maricopa County*, 415 U.S. at 259 (internal quotation omitted). Indeed, these reductions will be devastating.

As we have noted, for those Californians who have not recently arrived from other states, the maximum benefits from AFDC and food stamp programs in 1994 constituted only 86 percent of the poverty line. *See 1994 Green Book*, *supra*, at 366. But, as explained by Michael Wald in an expert declaration before the trial court, "[m]ost people who study income and welfare agree that an income less than the poverty line jeopardizes the basic well-being of all family members." (Wald Decl. ¶ 9, at 4, attached to *amicus* brief of Coalition of Homelessness of San Francisco in trial court record).⁴ In fact, some studies suggest that an income substantially above the poverty line is necessary for a "bare minimum" existence in California. *See Welfare Reform*, *supra*, at 10 (discussing study by Consumers Union of America).

The absence of sufficient income to meet the basic needs of children has severe consequences. Poverty decreases a parent's ability to provide emotional support to

⁴ *See also Welfare Reform*, *supra*, at v, 9 (noting that a recent national report by Republican members of the U.S. House of Representatives Committee on Ways and Means finds that AFDC levels are insufficient for "basic survival"); *id.* at 11 ("Just recently the National Commission on Children, the most broadly representative and politically diverse group of politicians, service providers, community leaders and academicians ever to address the needs of children, concluded that 'AFDC fails to meet most families' minimum economic needs . . . In none of the 50 states do combined welfare benefits . . . provide even a modestly secure standard of living for families with children.'"); *Children at Risk*, *supra*, at 11.

children, *id.* at 32, leads to emotional problems for children, *id.* at 35, increases mortality rates for young children, *cf.* Children's Defense Fund, *America's Children Falling Behind: The United States and the Convention on the Rights of the Child* 2 (1992) [hereinafter "America's Children"], and, by increasing stress on families, increases the likelihood of child abuse, *id.* at 26.⁵ The Children's Defense Fund summarizes:

Because the poverty thresholds reflect the minimum incomes that families and children need, growing up with a family income below—and often far below—that level threatens children's full and healthy development in a host of ways. From the womb to adulthood, poor children are at higher risk of health, developmental, and educational setbacks—problems, that are likely to follow them through life. For some children, poverty is deadly. Each year, an estimated 10,000 American children die from poverty's effects. For many more, poverty leads to inadequate health care, hunger, family stress, inability to concentrate in the classroom, and school dropout.

Id. at 19-20.

California's durational residency requirement will reduce the benefits provided to new residents significantly below the already inadequate levels provided to long-term residents. While California set 1993 benefits at

⁵ See also *Welfare Reform*, *supra*, at v ("[N]umerous studies show[] that poor children have significantly greater health, academic and emotional problems than children from non-poor families."); *id.* at vi, 11, 32; Wald Decl. ¶ 9, at 4 (poverty leads to inadequate nutrition, unsafe housing, inadequate emotional support, and poor educational opportunities); Center on Hunger, Poverty and Nutrition Policy, *Two Americas: Comparisons of U.S. Child Poverty in Rural, Inner City and Suburban Areas* 13 (1994) ("Poverty may be the single most important factor in producing outcomes we fear most for our young. The high correlation of poverty with poor health, drugs, and school failure, for example, suggests that attempts to improve the condition of childhood in America must start with efforts to reduce poverty.").

\$624 a month for a three-person family, the median state grant across the country was a mere \$367 a month. *See 1994 Green Book*, *supra*, at 375-77. Benefit levels provided to families from 22 states will be *less than half* the level considered by California itself to be essential for purchasing basic necessities,⁶ according to Robert Greenstein, Executive Director of the research Center on Budget and Policy Priorities. (Greenstein Decl., JA 90.)

The full impact of the reduced benefits can best be understood by highlighting one consequence for new residents—they are likely to live in extremely poor housing or even become homeless. Even with the higher benefits available to long-term residents, "[m]ost families in California who receive AFDC benefits often live in apartments of poor quality, or live in overcrowded apartments." (Wald Decl. ¶ 10, at 4.) In Los Angeles County alone, according to a 1987 *Los Angeles Times* survey, 200,000 people lived in garages many of which lacked heat, electricity and plumbing and which rented for as high as \$400 per month. *See Jennifer Wolch and Michael Dear, Malign Neglect: Homelessness in an American City* 81 (1993).

New residents dependent on AFDC will be even worse off than long-term residents, as a result of the significantly reduced benefits they will receive. "[N]ew residents from 16 states will find the benefit they receive for a family of three is less than *half* the Fair Market Rent for even a *one*-bedroom apartment in California." (Greenstein Decl., JA 89.) For example, a Texas family will receive only \$184 a month, *see Welfare Reform*, *supra*, at 35, while even "a typical eight-by-ten-foot, SRO hotel room in Skid Row rented for about \$240 per month [according to a 1986 study of Los Angeles County]." Wolch and Dear, *supra*, at 125. Thus, renting an

⁶ In 1993, California thought that \$703 per month was necessary for a family of three (it sets its "need" standard at this level). (Greenstein Decl., JA 90).

apartment will often cost more than new residents will receive even if they had no other expenses.

The thorough inadequacy of such income is apparent when one considers that even for a poor family which spends only half of its income on housing, “[a]n unexpected expense, even a small one, easily can [lead to] homelessness.” Children’s Defense Fund, *Leave No Child Behind: The State of America’s Children* 37 (1992) [hereinafter “*Leave No Child Behind*”]. As Professor Wald explains:

As a result of decreased benefits due to the residency requirement, many families will not be able to afford rent in anything but the lowest quality housing. Moreover, those families who cannot afford even this rent will be forced to ‘double up’ with family or friends in crowded conditions, or to live in cars or vans. In addition, some families will become homeless.

(Wald Decl. ¶ 13, at 5).⁷ The consequences are devastating. Children who live in substandard housing are often exposed to lead paint, and structural, electrical, and sanitation hazards including rats and lack of adequate plumbing. See *Leave No Child Behind*, *supra*, at 38; Wald Decl. ¶ 14, at 5; *Welfare Reform*, *supra*, at 9, 33. The Children’s Defense Fund concludes:

A decent home is a basic anchor of family life. Without it, virtually every aspect of a child’s existence is disrupted. In all key measures of health, nutrition,

⁷ See also Greenstein Decl., JA 89 (“The reduced grants can be expected to force some newcomer AFDC families to move into overcrowded or substandard quarters, or even to become homeless, all of which can pose significant health and safety risks to residents, especially children.”); *Welfare Reform*, *supra*, at 10, 34, 39; Wolch & Dear, *supra*, at 36. Cf. *Leave No Child Behind*, *supra*, at 35 (noting that between 1980 and 1992, the number of homeless children grew from almost none to 100,000 partly as a result of “a decade of inadequate government housing and income assistance for poor families”).

and emotional and educational well-being, poorly housed and homeless children routinely fare worse than other children.

Leave No Child Behind, *supra*, at 35. See also Wald Decl. ¶ 14, at 5. Moreover, many are left without shelter at all. Cf. National Law Center on Homelessness and Poverty, *No Way Out: A Report Analyzing the Options Available to Homeless and Poor Families in 19 American Cities* 77 (August 1993) [hereinafter “*No Way Out*”] (reporting that San Francisco’s 224 family shelter spaces served only 16 to 20% of homeless family members).

Inadequate housing and homelessness also frequently lead to family break up. See “Building Together—Housing, AFDC and Child Welfare,” *Family Matters* (Center for Law and Social Policy, Washington D.C.), Spring 1994 at 4 [hereinafter “Building Together”]. The stress placed on families by poverty often destabilizes them leading to neglect and as a result to foster care. See “Foster Care Beats AFDC—Financially,” *Family Matters* (Center for Law and Social Policy, Washington D.C.), Winter 1994 at 10-11. Moreover, “state agencies often view inadequate housing [itself] as a form of parental neglect and cause to remove or keep a child from his or her home.” “Building Together,” *supra*, at 4.⁸ Finally, we note that because many homeless shelters accept women and children but not men, and because of numerical limits on each shelter’s ability to accept individuals, homeless families often must split up to find shelter. See *Leave No Child Behind*, *supra*, at 38; *No*

⁸ Cf. “Child Welfare—A System in Crisis,” *Family Matters* (Center for Law and Social Policy, Washington, D.C.), Winter 1994, at 8 (“While every parent must provide supervision for young children, low-income parents must provide much more intense supervision because their environment is more dangerous. If a child . . . falls out of the window, the mother is usually blamed for neglect even though the incident could have been prevented by improving the quality of the housing.”).

Way Out, supra, at 4, 78. In San Francisco, 75 percent of providers reported that families were splitting up to find shelter in the city. *See No Way Out, supra*, Table 2. A 1986 study by the National Black Child Development Institute discovered the inherent result: substandard housing or homelessness factored into 30 percent of foster care placements. *See Leave No Child Behind, supra*, at 38. Only six percent of the families were offered housing assistance as an alternative to having their children placed in foster care. *See id.* Moreover, because AFDC payments for each child are less than foster care payments, there is an incentive for families to leave children in foster care once they are there, according to a 1993 Congressional Research Service Report. *See "Kinship Care and AFDC," Family Matters* (Center for Law and Social Policy, Washington, D.C.), Spring 1994 at 16-17. *See also "Foster Care Beats AFDC—Financially," supra*, at 10-12.

In sum, California's reduction in benefits for new residents threatens their access to the basic necessities of life. It threatens their ability to find shelter, their health, their academic success and their emotional well-being. As a result, the *Shapiro* rule requires the State to demonstrate that it has a compelling interest in enforcing this law.

C. The Absence of a Compelling Justification.

Petitioners have not demonstrated that the statute is necessary to further a compelling state interest. Their only arguments are that the statute will save money and (they imply without explicitly stating) that it will deter migration to California of persons who need AFDC benefits. *See Pet. Br.* 21-22. But *Shapiro* and its progeny explicitly hold that neither a general money-saving rationale nor an interest in deterring poor persons from migration into the state is constitutionally sufficient.⁹ Since the only

⁹ The Court has also held that deterring poor persons is not an acceptable rationale even as a means of "sustain[ing] the political

interests posited by petitioners in this case are ones this Court has already rejected as illegitimate, it follows that the law is plainly unconstitutional.

II. *SHAPIRO* REMAINS GOOD LAW AND SHOULD NOT BE OVERRULED OR UNDULY RESTRICTED.

Rather than making a serious effort to satisfy the *Shapiro* standard, petitioners ask the Court to relax its scrutiny of laws disfavoring new state residents, even where "basic necessities" are at stake. They also contend that the Court should erect a kind of "safe harbor" allowing states to penalize new residents—to whatever extent and for whatever reason—as long as each new resident receives at least the level of benefits paid in his prior home state. These approaches should be rejected.

A. The Court Should Not Read Into the *Shapiro* Doctrine a New Principle Allowing States to Disfavor New Residents As Long As They Match the Benefits Paid in Each New Resident's Prior State.

The approaches proposed by petitioners would not be justified even if this were a case of first impression, because the principles espoused in this Court's "right to travel" cases are both persuasive and extremely important. These principles ensure the existence of a unified Nation and prevent the creation of second-class citizenries. Overturning *Shapiro* and adopting petitioners' safe harbor concept would undermine these values.

The first core principle previously embraced by this Court is the notion that each individual has a right to choose where to live after considering the (fundamental) benefits each state provides, rather than having a right to choose where to live with state benefits removed from the calculus. The idea is that in a federal system in which states provide different types and levels of taxes and

viability of [a state's welfare] programs." *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 266 (1974).

benefits, each individual should be able to choose under which governmental scheme she wishes to live. As Justice Brennan explained in his concurrence in *Zobel*:

a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. . . . That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a large framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation.

457 U.S. at 67-68 (Brennan, J., concurring). *See also* *Shapiro*, 394 U.S. at 632; *Maricopa County*, 415 U.S. at 264.

The holdings of the right to travel cases are also based on the principle that an individual should not face “second-class citizenship” even for a year. If an individual moves from state X to state Y, and state X, unlike state Y, only allows citizens to vote for mayor but not city council, she should not be prevented from voting for city council in state Y. If state X does not provide money for special classes for gifted and talented students but state Y does, her children should not be prevented from entering gifted and talented classes in state Y. *See Zobel*, 457 U.S. at 64. This is especially true because if the Court allowed state Y to create such a caste system for a year, it could probably create such a system for two or five or ten years.

The creation of such second-class citizenship status for new residents would result in relative deprivation, making new residents worse off than they had been in their old state even if they received the same absolute level of benefits. More important, the increasing segmentation within states would undercut the idea of a unified nation

that is at the heart of the right of travel. As Justice Brennan explained:

if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his accrued seniority . . . then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive.

457 U.S. at 68 (Brennan, J., concurring). In order to avoid such a result, courts must assess whether a statute penalizes the right to travel by comparing new residents with long-time residents.

The appropriateness of this comparison is even more apparent after considering the alternative implicitly proposed by defendants. Defendants argue that California's statute is neutral because it leaves plaintiffs in the same position they were in before they moved. But this implies that any statute that puts plaintiffs in a worse position than they were in before they moved would penalize the right to travel. If this were true, then a Texas statute providing lower AFDC benefits than California would be considered to “penalize” Californians who moved to Texas (they would receive fewer benefits as a result of moving and hence would be worse off) even though they would receive the same benefits as other Texans. Thus, in order to avoid “penalizing” new residents for having exercised their right to travel, Texas would have to pay new Texas residents higher AFDC benefits than it paid to long-time Texas residents.¹⁰

¹⁰ The Court correctly rejected use of such a baseline in *Dunn*. It explained that where a state has a higher age requirement for driving than a state from which an individual moved, this “is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.” *Dunn v. Blumstein*, 405 U.S. 330, 342 n.12 (1972).

The reason such a result would be absurd is that the lower AFDC benefits provided by Texas would not have been enacted to punish Californians who moved to Texas any more than the hot summers in Texas would have been created to punish those who moved. Rather Texas' lower AFDC benefits would be one background consideration that a person might reasonably take into account in deciding whether to move. In contrast, a law that provided lower welfare benefits to those who moved to Texas than to long-time Texas residents would punish those who moved for choosing to move. Thus, it is only statutes that distinguish between new and long-term residents that "penalize" new residents for having moved. And it is such statutes that undermine the existence of a unified Nation and risk the creation of second-class citizens.

B. Principles of *Stare Decisis* Argue in Favor of Continuing to Apply *Shapiro* with Full Force in This Context.

In addition to their inherent importance, the principles articulated in *Shapiro* remain worthy of support because they have become a vital part of our constitutional tradition. Both the Court's application of strict scrutiny and its approach of comparing new and long-term residents have been followed in subsequent cases and are in consonance with decisions in other areas of constitutional law.

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Ry. Comm'n*, 112 S. Ct. 560, 563 (1991) (quoting *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494 (1987)).¹¹ It follows that, "[a]lthough adher-

¹¹ See also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (*stare decisis* provides a needed check on the "'arbitrary discretion' of unelected judges) (quoting *The Federalist*, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)); *Moragne v. State*

ence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992) (supplying examples of special justifications). In this case, petitioners have offered no "special justification" supporting a change in a doctrine that has been in place for 25 years.

To begin with, no aspect of the *Shapiro* rule has proved "to be intolerable simply in defying practical workability." *Casey*, 112 S. Ct. at 2808. In fact, this Court and others have applied *Shapiro* with little difficulty. Nor have any factual changes "robbed [Shapiro] of significant application or justification." *Casey*, 112 S. Ct. at 2809. Significant limitations on AFDC continue to constitute a deprivation of the basic necessities of life, *see* pp. 9-14 *supra*. Moreover, it is just as true now as it was in 1969 that distinctions between new and long-term residents will undermine the concept of a unified Nation in which citizens can move freely from state to state without losing their status as first-class citizens.

In fact, the only "special justification" petitioners and their *amici* even attempt to advance for overruling *Shapiro* is that it has been overtaken by subsequent constitutional developments. However, rather than being a "remnant of abandoned doctrine," *Casey*, 112 S. Ct. at 2808, as defendants contend, *Shapiro* remains a basic feature of our constitutional structure. The Court followed *Shapiro*

Marine Lines, 398 U.S. 375, 403 (1970) (*stare decisis* ensures continued "public faith in the judiciary as a source of impersonal and reasoned judgments"); *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (Respect for precedent serves to ensure "that the law will not merely change erratically, but will develop in a principled and intelligible fashion. [It] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact").

in both *Dunn* and *Maricopa County*. And, although the Court has not applied *Shapiro* directly since its decision in *Maricopa County*, this hardly demonstrates a retreat from *Shapiro*'s principles. Rather it demonstrates the degree to which *Shapiro* has become firmly embodied in the law, so that no case to which *Shapiro* squarely applies has presented itself to the Court.¹²

Nor is there any support for petitioners' position in the Court's most recent cases involving legal distinctions based on duration of residency. To begin with, in all three of these cases, *Zobel*, *Hooper*, and *Soto-Lopez*, the Court *invalidated* laws that disfavored newer state residents. It applied rational-basis scrutiny but explained that this was because it had no need to consider whether strict scrutiny was required. *See Zobel*, 457 U.S. at 60-61; *Hooper*, 472 U.S. at 618; *Soto-Lopez*, 476 U.S. at 913 (Burger, C.J., concurring in the judgment).

Moreover, even if these more recent cases could be read as mandating *only* rational-basis scrutiny of the laws there at issue, they still would not call into question the strict scrutiny applied in *Shapiro*. These laws involved disparities in the availability of relatively minor governmental benefits, not access to basic necessities or fundamental rights.¹³

¹² There is no basis for the suggestion that the decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), upholding a durational residency requirement for access to a state's divorce courts, constituted a retreat from *Shapiro*. The Court there emphasized that the burden on individual interests (a delay in obtaining a final divorce adjudication) was far less severe than in *Shapiro*, *Dunn* and *Maricopa County*, *id.* at 406; it certainly did not amount to reduced access to a basic necessity of life. The state's interests were also greater and may even have been compelling. *Id.* at 407. They included an interest in protecting individuals other than the states' residents and the state itself (the spouse and children who continued to reside in a different state). *Id.* at 406-07.

¹³ Thus, *Zobel* involved distributions of cash by the state government in annual amounts ranging from \$50 to \$1050 depending on years of residency. 451 U.S. at 57. *Hooper* involved a tax exemp-

For similar reasons, these cases hardly suggest that a state always acts constitutionally so long as it provides new residents the same level of benefits as they received in their former state. In invalidating the statutes at issue, the Court looked only at the states' treatment of new and old residents, without regard to how the new residents' treatment compared with that in their prior home states. Moreover, in each of these cases, the Court reemphasized that it is flatly illegitimate for a state to discriminate against new residents based on the view that the state may take care of "its own." *Hooper*, 472 U.S. at 623. *See also Zobel*, 457 U.S. at 63; *Soto-Lopez*, 476 U.S. 898 (Burger, C.J., concurring in the judgment). These cases thus hardly call for reconsideration of strict scrutiny of distinctions between new and long-term residents with respect to access to basic necessities.

At the same time, it is important to recognize that *Shapiro* stands as part of a long line of cases granting strict scrutiny to unequal provision of rights that are fundamental. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down penalty of sterilization applied to robbers but not embezzlers because procreation is a fundamental right); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down poll tax as unequal provision of the fundamental right to vote); *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking down Illinois' refusal to furnish indigent defendants with free trial transcripts where state had granted a right to appellate review). The Court's careful protection of a right to travel that flows from the very nature of our Federal Union¹⁴ is well within this tradition.

Indeed, it draws further support from other constitutional doctrines. For example, under the suspect-class

tion applicable to \$2000 of taxable property. 472 U.S. at 614. *Soto-Lopez* involved bonus points awarded in the scoring of state civil-service examinations. 476 U.S. at 900.

¹⁴ *See Shapiro*, 394 U.S. at 627.

prong of the Equal Protection Clause, the Court applies heightened scrutiny to laws that discriminate against “discrete and insular minorities.” *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938). The Constitution’s special solicitude for such minorities supports application of similar solicitude for newcomers under the right to travel, because newcomers, and particularly poor newcomers, constitute just such a minority. Newcomers have been discriminated against historically, *see, e.g.*, *Shapiro*, 394 U.S. at 628;¹⁶ they remain a likely target of “pervasive discriminatory treatment on a wide range of issues”; they have “an easily identifiable membership . . . and the criteria [are] such that no significant number of the political majority run the risk of falling into the class in the future as a result of changing circumstances.” McCoy, *supra*, at 1020-21. *See also* Stephen Loffredo, “*If You Ain’t Got the Do, Re, Mi*”: *The Commerce Clause and State Residence Restrictions on Welfare*, 11 Yale Law & Policy Review 147, 172 (1993) (“[P]oor people from other states present an irresistible target, being politically disabled as a result of both poverty and geography.”).

The values animating the Privileges and Immunities Clause of Art. IV also bolster the Court’s decision to give close scrutiny to distinctions between newcomers and long-time residents with respect to basic necessities. The Privileges and Immunities Clause “was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” *Zobel*, 457 U.S. at 74 (O’Connor, J., concurring) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)). While it has been argued that the Clause does not technically

¹⁶ *See also* Decl. of Michael Katz, JA 97 (explaining that California’s residency requirement is a modern version of the “settlement” laws of Elizabethan England and early America which did not deter migration, which created significant hardships for families which moved, and which caused significant administrative problems for local governments as well as much expensive litigation).

apply to laws that discriminate against new *residents* because they are no longer citizens of other states, *see Shapiro*, 394 U.S. at 666 (Harlan, J., dissenting); *but see Zobel*, 457 U.S. at 71-81 (O’Connor, J., concurring), surely the existence of California citizenship does not render the underlying *purpose* of the Clause inapposite. This is especially true because most of those the law affects are citizens of other states who have not yet chosen to come to California.

The principles underlying the Commerce Clause also help justify the Court’s right-to-travel jurisprudence. Under the Commerce Clause, state laws that burden interstate commerce because of its interstate nature are strictly scrutinized absent congressional authorization. *See, e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (“At a minimum . . . facial discrimination invokes the strictest scrutiny”). The baseline in Commerce Clause cases is similar to that in right-to-travel cases. A state may not disfavor commerce coming from out of state, as compared with purely intrastate transactions.¹⁷ Among other values it serves, the Commerce Clause promotes a unified Nation in which states do not engage in a destructive competition against each other, and it precludes states from regulating against those who have no voice in state governance. *See Loffredo, supra*, at 193-99. The Court’s right-to-travel jurisprudence similarly limits the ability of states to compete to fence out indigents and protects those outside the state who have no voice in state governance.

For all of these reasons, it is spurious to suggest that the Court should disregard principles of *stare decisis* in

¹⁷ *See, e.g.*, *Bacchus Imports v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, the Court held that a Hawaii liquor tax exemption for two liquors made from Hawaiian grown plants burdened out of state liquors. In reaching this conclusion, the Court did not ask whether liquors imported into Hawaii were taxed at a higher rate than in their state of origin.

this case based on more recent developments in the law. There remains every justification for applying strict scrutiny to a law that penalizes new state residents by making them worse off than long-term residents with respect to their access to the basic necessities of life.

III. EVEN UNDER A MORE RELAXED LEVEL OF SCRUTINY, THE CALIFORNIA LAW WOULD STILL BE UNCONSTITUTIONAL.

For all of the reasons already set forth, *amicus* believes that the law at issue here warrants searching constitutional scrutiny. But even if the Court were inclined to adopt petitioners' indefensible notion that only rational-basis scrutiny applies to laws matching the benefits provided to new residents with those from their old state, this law would still be unconstitutional. First, this law does not actually provide new residents the same level of benefits that they received in their former states. Second, the law cannot survive rational-basis review in any case.

A. The Statute Does Not Leave Recipients as Well Off as They Would Have Been in Their Former States.

California's statute is unconstitutional even under defendants' theory of the case. California's statute does not leave plaintiffs as well off as they were in the states from which they came, because California's cost of living is higher than in most states and California provides lower levels of non-AFDC benefits. In 1988, California housing prices were almost twice the national average and the difference was increasing. Wolch and Dear, *supra*, at 70. When California's AFDC levels are considered relative to housing costs in California, California benefit levels are near the middle rather than among the highest of the states. (Greenstein Decl., JA 87). "In fact, when the relative costs of housing are added into the calculation, families in 30 other states receiving AFDC and food stamps have more income at their disposal." *Welfare*

Reform, supra, at 11. Furthermore, "only about one in eight AFDC recipients in California receives any housing subsidy, compared to the national average of about one in four." (Greenstein Decl., JA 88). This fraction is the lowest of any state. See Wolch and Dear, *supra*, at 118; *Welfare Reform, supra*, at 11. Thus, California hardly seems likely to serve as a "welfare magnet." It does not need to provide lower welfare benefits to newcomers in order to prevent them from coming in search of high benefits. In fact, even setting aside the fact that California provides lower housing subsidies and food stamps than other states, it is clear that California's statute makes most newcomers who receives AFDC significantly worse off than they were in their former state. Robert Greenstein concludes that:

In all but one of the 46 states (including the District of Columbia as a state) in which AFDC benefit levels are lower than in California, the average statewide costs of modest housing are also lower than in California. This means that newly entered residents *from 45 of these 46 states* typically will face higher costs of living without any increase in their AFDC benefits to help meet those costs.

(Greenstein Decl., JA 88) (emphasis added). The district court agreed, finding as a fact that "the measure cannot fairly be said to provide the same payment as new residents could have received in the state of their prior residence since the cost of living . . . generally is much higher in California than elsewhere." *Green v. Anderson*, 811 F. Supp. at 521; *see also id.* at 521 n.13. Thus, even under defendants' reading of *Shapiro*, California's statute penalizes travel. As a result, it must receive heightened scrutiny under which it would be unconstitutional.

B. The Statute Lacks a Rational and Legitimate Basis.

Finally, we note that California's statute would be unconstitutional even under rational-basis review. California makes almost no effort to explain why its statute is more

rational than the ones struck down by the Court in *Zobel*, *Hooper*, and *Soto-Lopez*. Those cases make clear what is true for any law—when the state treats some people worse than others (even temporarily), it must have *some* reasonable explanation for why it is doing so. *See, e.g.*, *Hooper*, 472 U.S. at 621 (rejecting the justification that New Mexico's statute eased the transition of veterans into civilian life because this purpose did not distinguish veterans who had been New Mexico residents from those who had not).

If California's assertion that its statute is necessary to save money refers to savings on welfare payments to persons *already in California*, the State has no basis for singling out new residents to meet this goal. *See Anderson*, 811 F. Supp. at 523 ("group of [new] residents is no better able to bear the loss of benefits than a group randomly drawn").¹⁷ That is why the *Shapiro* Court stated that a State could never save money "by [drawing] invidious distinctions between classes of its citizens." *Shapiro*, 394 U.S. at 633. *See id.* at 633 n.11 (citing *Rinaldi v. Yeager*, 384 U.S. 305 (1966), as having held that a New Jersey statute aimed at saving money lacked a rational basis because the classification it drew did not advance its money-saving rationale).

At times petitioners suggest that the goal was to *deter indigents from moving to California in the future*. See Pet. Br. 21-22. But, just as the purpose of rewarding a state's long-term residents remains constitutionally impermissible under rational-basis review, *see pp. 8, 21 supra*, the purpose of deterring migration remains constitutionally impermissible as well. Otherwise, *Zobel*, *Hooper* and *Soto-Lopez* would stand for the bizarre proposition that a state cannot take care of "its own" by favoring long-term

residents as a reward for their service to the state but it can do so in order to deter new residents from coming. Hence, this Court can decide this case simply by holding that California's statute fails even rational-basis scrutiny.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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¹⁷ In fact, at an intuitive level, those who have been completely uprooted are likely to need more money not less. Neither the state nor its *amici* advance any evidence to the contrary.